

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

LYCURGAN INC. DBA  
ARES ARMOR,

Plaintiff.

VS.

B. TODD JONES in his official capacity as Head of the San Diego Bureau of Alcohol, Tobacco, Firearms and Explosives; and DOES 1-10,

## Defendants.

CASE NO. 14-CV-1679 JLS (BGS)

**ORDER DENYING  
EMERGENCY APPLICATION  
FOR AN ORDER FOR  
EXPEDITED RULE 34  
INSPECTION AND TO  
CONTINUE HEARING DATE  
AND RELATED FILING  
DEADLINES**

(ECF No. 8)

Presently before the Court is Lycurgan, Inc’s (“Plaintiff”) Emergency Application for an Order for Expedited Rule 34 Inspection and to Continue Hearing Date and Related Filing Deadlines (“Emergency Application”). (ECF No. 8.) Also before the Court is Defendant’s Response in Opposition to (ECF No. 9.) and Plaintiff’s Reply in Support of (ECF No. 10.) the Emergency Application. Having considered the parties’ arguments and the law, the Court **DENIES** Plaintiff’s Emergency Application.

## BACKGROUND

On July 16, 2014, Plaintiff filed a Complaint seeking the return of items seized during a search of its property pursuant to the Civil Asset Forfeiture Reform

1 Act (“CAFRA”). 18 U.S.C. §983. (ECF No. 1.) On September 22, 2014, Defendant  
 2 filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to  
 3 Federal Rule of Civil Procedure 12(b)(1) (“MTD”). (ECF No. 7.) Defendant’s MTD  
 4 is pending before the Court.

5 **LEGAL STANDARD**

6 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1)  
 7 challenges a court’s subject matter jurisdiction. Federal district courts are courts of  
 8 limited jurisdiction that “may not grant relief absent a constitutional or valid  
 9 statutory grant of jurisdiction” and are “presumed to lack jurisdiction in a particular  
 10 case unless the contrary affirmatively appears.” *A-Z Int’l v. Phillips*, 323 F.3d 1141,  
 11 1145 (9th Cir. 2003) (internal quotations omitted).

12 Rule 12(b)(1) motions may challenge jurisdiction facially or factually. *Safe*  
 13 *Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a facial attack,  
 14 the challenger asserts that the allegations contained in a complaint are insufficient  
 15 on their face to invoke federal jurisdiction. By contrast, in a factual attack, the  
 16 challenger disputes the truth of the allegations that, by themselves, would otherwise  
 17 invoke federal jurisdiction.” *Id.* A challenge to subject matter jurisdiction may be  
 18 considered a factual attack when the attack relies on extrinsic evidence, as opposed  
 19 to the pleadings alone, to contest the truth of the allegations. *See id.*

20 When there is a factual attack the Court may look beyond the Complaint to  
 21 affidavits and other evidence submitted by the parties in order to evaluate the Rule  
 22 12(b)(1) motion. *Savage v. Glendale Union High Sch.* 343 F.3d 1036. Accordingly,  
 23 in response to a Rule 12(b)(1) motion based on a factual attack, the non-moving  
 24 party may be entitled to discovery related to the jurisdictional question. *See Laub v.*  
 25 *U.S. Dept. of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003). Discovery should be  
 26 granted “when . . . jurisdictional facts are contested or more facts are needed” to  
 27 determine a question of jurisdiction. *Id.* However, “when it is clear that . . .  
 28 discovery would not demonstrate facts sufficient to constitute a basis for

1 jurisdiction,” a Court need not grant a discovery request prior to ruling on a Rule  
 2 12(b)(1) motion. *America W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801  
 3 (quoting *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 431, n. 24).  
 4 Discovery at the outset of a case should be limited to jurisdictional matters. *U.S.*  
 5 *Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79–80  
 6 (1988).

## 7 ANALYSIS

8 Plaintiff requests discovery before responding to Defendant’s MTD pursuant  
 9 to Federal Rule of Civil Procedure 26(d), which allows a party to seek discovery  
 10 prior to the Federal Rule of Civil Procedure 26(f) conference upon a court order.  
 11 Fed. R. Civ. P. 26(d). (Emergency Application 7<sup>1</sup>, ECF No. 8-1.) Plaintiff suggests  
 12 that it is entitled to seek discovery from Defendant at this time because Defendant’s  
 13 MTD is a factual attack based on extrinsic evidence. (Reply in Support of MTD  
 14 2–4, ECF No. 10.) Plaintiff argues that the declarations of two special agents  
 15 attached as exhibits to Defendant’s MTD are extrinsic evidence that turn the Rule  
 16 12(b)(1) motion into a factual attack challenging this Court’s subject matter  
 17 jurisdiction. (*Id.*)

18 While the declarations attached to Defendant’s MTD are extrinsic evidence,  
 19 they are not used as a basis for Defendant’s jurisdictional challenge. Only when  
 20 extrinsic evidence is relied upon to form the basis of a challenge to subject matter  
 21 jurisdiction does a facial attack become a factual attack. *See Safe Air for Everyone*  
 22 *v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The mere inclusion of extrinsic  
 23 evidence, here the declarations of two agents cited to in the Statement of Facts  
 24 section of Defendant’s MTD, does not turn a facial attack into a factual attack.

25 Furthermore, even if Defendant’s MTD was construed as a factual attack  
 26 based on the inclusion of the agents’ declarations, discovery related to whether the  
 27 lower receivers seized during the execution of the search warrant are firearms would

---

28 <sup>1</sup>For ease of reference, the page numbers cited to are the ECF page numbers.

1 not help resolve the jurisdictional issue raised in Defendant's MTD. In Defendant's  
2 MTD, he does not argue that this Court's subject matter jurisdiction turns on  
3 whether the lower receivers are considered firearms. (MTD 4, ECF No. 7.) Instead,  
4 Defendant argues that this Court lacks subject matter jurisdiction because the lower  
5 receivers were not seized in a nonjudicial civil forfeiture proceeding. (*Id.*) At this  
6 early stage in the case, prior to a 26(f) conference, discovery by court order is only  
7 appropriate to resolve issues of jurisdiction. *See U.S. Catholic Conference v.*  
8 *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79–80 (1988). Here, granting  
9 Plaintiff's discovery request would not assist in determining this Court's  
10 jurisdiction.

11 **CONCLUSION**

12 In light of the foregoing, the Court **DENIES** Plaintiff's Emergency  
13 Application for an Order for Expedited Rule 34 Inspection.

14 **IT IS SO ORDERED.**

15  
16 DATED: October 22, 2014

17   
18 Honorable Janis L. Sammartino  
19 United States District Judge  
20  
21  
22  
23  
24  
25  
26  
27  
28